



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Allied Corporation; Menasco, Inc.--Requests for  
Reconsideration  
File: B-223970.2; B-223970.4

Date: March 20, 1987

### DIGEST

1. Decision sustaining protest on ground that awardee engaged in discussions with agency and that protester thus also should have been included in discussions is affirmed on reconsideration where there is no showing that General Accounting Office erroneously concluded that discussions took place.
2. Fact that protester may have difficulty preparing competitive best and final offer in response to General Accounting Office recommendation that discussions be reopened is not a sufficient basis for eliminating competition altogether by instead recommending award to protester.

### DECISION

Allied Corporation, Bendix Aircraft Brake & Strut Division (Bendix), requests reconsideration of our decision in Menasco, Inc., B-223970, Dec. 22, 1986, 86-2 C.P.D. ¶ 696, in which we sustained Menasco's protest of the rejection of its offer and the award of a contract to Bendix under request for proposals (RFP) No. F42600-85-R-0781, issued by Hill Air Force Base, Utah, for C5 A/B aircraft main landing gear parts. Menasco, Inc., also requests reconsideration, asking that our recommendation that the Air Force reopen discussions be withdrawn in favor of a new recommendation that Bendix's contract be terminated and a contract be awarded to Menasco.

We affirm the prior decision and recommendation.

Menasco alleged in its protest that it reduced its offer in response to negotiations initiated by the contracting officer, who then rejected the price reduction as a late modification. Menasco contended that the Air Force

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improperly awarded the contract to Bendix on the basis of initial proposals while knowing that Menasco was willing to lower its price.

We sustained the protest and recommended that the Air Force reopen discussions because the record indicated that discussions had occurred between the Air Force and Bendix and that award to Bendix thus was not made on the basis of initial proposals. Since discussions cannot be conducted with only one offeror but, rather, must be held with all offerors in the competitive range, we held that Menasco should have been afforded an opportunity to revise its initial proposal.

#### Bendix Reconsideration

Bendix contends in its reconsideration request that in our decision we erroneously concluded that Menasco's protest was timely, and we incorrectly found that Bendix had revised its initial proposal or otherwise participated in discussions.

In considering the timeliness of Menasco's protest, we noted that the Air Force and Menasco had differing versions of a June 25, 1986 meeting. The Air Force contended that Menasco should have protested within 10 days of that meeting because the firm was notified there that late modifications would not be considered. Menasco, on the other hand, contended that it received no such notice at the meeting and that it first learned of the rejection of its revised price as a late modification when it received the contracting officer's July 1 letter rejecting the modification. We held that since there was doubt as to the timeliness of the protest, and we resolve such doubt in favor of the protester, the protest was timely. Bendix challenges our conclusion, contending that Menasco failed to provide evidence supporting the timeliness of the protest, and that there thus was no legitimate doubt to resolve in Menasco's favor.

Contrary to Bendix's contention, Menasco did support its position with a statement and an affidavit signed by two Menasco employees who attended the June 25 meeting. In any case, since the Air Force submitted no conclusive evidence establishing when Menasco first was on notice that its modification would not be accepted, even Menasco's unsupported account of the June 25 meeting would be entitled to the same weight as the Air Force's for purposes of determining timeliness. We therefore affirm our timeliness determination.

Bendix's second argument is that its June 11, 1986 telex to the Air Force concerning the contents of the firm's offer, which we concluded constituted discussions, merely clarified,

in response to the contracting officer's inquiry, that Bendix intended to charge a price of \$19,395,688 as a rent-free price (based on using facilities under another government contract) or a rent-paid price (based on using other facilities). This argument is without merit.

The determinative consideration here is not whether Bendix intended to offer one price whether award was on a rent-free or rent-paid basis, but whether its proposal expressed that intent sufficiently that it did not later have to be established in discussions with the Air Force. If Bendix intended to charge \$19,395,688 as a rent-paid or rent-free price, as it now maintains, this fact was not clear to the Air Force from Bendix's initial proposal, as evidenced by the Air Force's request, to which the telex responded, that Bendix propose a rental charge (expressed as percentage) if not already included in the price.

As explained in our prior decision, "discussions" encompass any oral or written communication between the government and an offeror that involves information essential for determining the acceptability of a proposal or provides the offeror an opportunity to modify its proposal. The communications between the Air Force and Bendix met this test since the contracting officer's determination of whether there was a rental factor and what it would be was essential for evaluating Bendix's offer. We accordingly affirm our conclusion that discussions occurred with Bendix, and that Menasco thus should have been afforded an opportunity to revise its proposal.

#### Menasco Reconsideration

Menasco contends that because of the Air Force's failure to stop work on Bendix's contract as required by the Competition in Contracting Act, 31 U.S.C. § 3553(d)(1) (Supp. III 1985), it has been unable to obtain competitive quotations from vendors, currently under contract to Bendix, for purposes of preparing its best and final offer. Menasco requests that we therefore change our recommendation to direct the Air Force to terminate Bendix's contract and make award to Menasco.

Under CICA and our Bid Protest Regulations, a contracting agency is required to suspend contract performance only if a protest is filed with our Office within 10 calendar days of contract award. See 4 C.F.R. § 21.4(b) (1986). The record indicates that Bendix's contract was awarded on July 31. Since Menasco's protest was filed with our Office on August 13, 13 calendar days after award, the Air Force was

not required to suspend Bendix's performance. We do not consider Menasco's possible difficulties in formulating a competitive best and final offer a sufficient basis for eliminating competition altogether by recommending award to Menasco. Our prior recommendation is affirmed.

*for Milton J. Auster*  
Comptroller General  
of the United States